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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-316

THOMAS GEORGE AZZONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

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The petitioner, Thomas George Azzone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals entered in this proceeding on August 1, 1972.

### OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, which is not yet reported, appears in the appendix hereto.

## JURISDICTION

The judgment and opinion of the Eighth Circuit Court of Appeals were entered on August 1, 1972, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

## QUESTION PRESENTED

Whether a warrantless arrest and search for and seizure of stolen property is justified solely because an automobile arrives at a place and time as predicted by an informer alleged only to have been reliable in the past, and where there is no independent basis for an arrest, the search is not incidental to the arrest, and there is no consent to the search?

## CONSTITUTIONAL PROVISION

### Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

A St. Paul, Minnesota, post-office was robbed on June 17, 1971. On June 30, a suburban Minneapolis police officer told a federal postal inspector that he had heard from

a previously reliable informer that Thomas Azzone had stolen postage for sale. Later that day, the postal inspector was told that Azzone would be selling the postage at the junction of highways 36 and 61 about 4:00 p.m. in a black Cadillac, license no. 4DV727. Stationed at that location, federal agents saw the black Cadillac arrive; after a time the driver, whom they did not recognize (it was Petitioner Azzone), left the car. The agents stopped him and asked if they could search the car; Azzone said "help yourself," and they searched the interior, finding nothing. Asked for the trunk keys, Azzone pointed to the ignition; none of these keys opened the trunk, however, and Azzone dropped a key into the interior of a car-door, whereupon he was formally arrested. The key, when retrieved, opened the trunk, where the stolen postage was found after Azzone had been taken to the police station. (After his formal arrest, Azzone tore and attempted to swallow an inventory of the postage.) The Cadillac was registered to Azzone. Azzone's conviction for receiving and concealing the stolen postage was affirmed by the Eighth Circuit Court, which found the arrest and subsequent search and seizure justified by probable cause under **White v. United States,** 448 F.2d 250 (8th Cir. 1971) as construed in light of **Adams v. Williams,** ... U.S. ..., 32 L.Ed.2d 612, 92 S. St. ... (decided June 12, 1972), which, the Court said, "effectively places its imprimatur" upon **White v. United States,** *supra.*

## REASONS FOR GRANTING THE WRIT

**The Court of Appeals for the Eighth Circuit Has Erroneously Confused, Combined and Extended the Holdings of This Court in Draper v. United States, 358 U.S. 307 (1959); Terry v. Ohio, 392 U.S. 1 (1968); Chambers v. Mahroney, 399 U.S. 42 (1970), and Adams v. Williams, ... U.S. ... (Decided June 12, 1972), to a Point Which Violates the Fourth Amendment by Allowing a So-Called Investigative Stop Without Probable Cause to Justify a Full-Scale Search, the Fruits of Which Are in Turn Used to Justify an Arrest, Which Then Is Seen in Effect Retroactively to Justify the Search as Incidental.**

This Court has defined a number of exceptions to the Constitutional requirements of search warrants and of probable cause for a warrantless arrest. Each of these exceptions arose in a particular factual context which rendered it reasonable or inevitable in those circumstances; now those exceptions, however, are being expanded into general rules which effectively interact to emasculate the Fourth Amendment's protections and allow arrests, searches and seizures upon mere suspicion. It is essential that this Court clarify the precise and limited application of the exceptions in question for the guidance of law enforcement agencies, courts and counsel.

In affirming Petitioner's conviction, the Eighth Circuit stated but barely discussed the facts, relying almost entirely upon their earlier opinion in **White v. United States**, 448 F.2d 250 (8th Cir. 1971), as controlling authority. In **White**, the police, upon an informant's tip that White possessed counterfeit money in a certain car and was using a false name, Homer Bennett, found a man slumped over the wheel of the described car. Investigating, the police were shown by White a driver's license obviously altered to contain the name Homer Bennett;

they arrested him upon the altered license charge and an incidental search yielded the counterfeit money. The Court held that (1) the initial "stop" was valid under **Terry v. Ohio** to investigate the tip and the possibility of a drunken or ill driver, and (2) the search was valid upon probable cause under **Chambers v. Mahroney.** Note that the "investigative stop" did two things: it confirmed the informer's tip and it disclosed an offense justifying arrest. Significantly, the Court said:

> Although there was probable cause to search the car, there was not yet probable cause to arrest him on the counterfeiting charge. 448 F.2d at 254.

It is clear from this that the Court recognizes two standards of probable cause, one for a search, another for an arrest; it is also clear that the standard for a search is the lower of the two; it is **not** clear what the difference between them is, nor is the Constitutional basis for such a distinction apparent. The reasoning is circular: the tip justified the investigation; the investigation justified the license offense arrest **and the search for counterfeit money,** but it did not justify the counterfeiting arrest, to which, by implication, the search was then retroactively incidental.

In the present case, the agent's observations confirmed the informer's tip only to the extent that the Cadillac arrived at a certain place at a certain time. Mr. Azzone was not recognized and he committed no offense in the officer's presence; he was arrested for possession of the stolen postage when he dropped a key into the door panel,[1] **before** the stolen postage was discovered—there

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[1] This, of course, was not a criminal act, but the exercise of his right not to consent to a search of the car. The government conceded there was no consent to the search of the trunk. The Eighth Circuit Court's suggestion that there was consent is misleading in this regard. (p. 5) Nor was it contended that the search was incidental to the arrest, Petitioner having already been removed from the scene.

was no independent basis for the arrest. Thus, the affirmance of his conviction extends the doctrine of **Terry v. Ohio** to a point where sufficient information to justify an investigative stop blossoms into probable cause to search even though the informer's tip is not as specific and detailed as or corroborated to the extent required by **Draper v. United States.**[2] The search, moreover, is not for the officer's protection, is not incidental to the arrest; it is specifically directed to discovering the contraband sought. The lack of a warrant is excused under **Chambers v. Mahroney**, although all the exigencies as well as the probable cause information of that case are absent.

Secondly, the Eighth Circuit Court reasoned that the opinion in **Adams v. Williams**, ... U.S. ... (decided June 12, 1972), "places its imprimatur" on the **White** decision. This reasoning involves the critical misconception of which Petitioner is now the victim. In **Adams** as in **White** a **Terry** investigative stop disclosed a crime, i.e., possession of a firearm; an arrest was therefore justified; a search incidental **to that arrest** yielded other contraband. In the present case there was no independent basis for Petitioner's arrest; the only foundation upon which his arrest and the search rested were the facts that he appeared at a certain place at a certain time in a car of the type predicted by an informer. Neither **Draper**, nor **Terry**, nor **Chambers** nor **Adams** has gone nearly so far as to justify a felony arrest on such mere suspicion. The Eighth Circuit's opinion (together with the **White** decision) exemplifies a manifest misconstruction and misapplication of this Court's exceptions to the Fourth Amendment's requirements. If allowed to stand, this decision will sanction arrests, searches and seizures, in this Cir-

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[2] Note that the only support of this informer's trustworthiness was his alleged **previous** reliability, which this Court discounted in **United States v. Harris**, 403 U.S. 573 (1971).

cuit at least, whenever an informer who is alleged to have been previously reliable correctly predicts the presence of a certain person in a certain car at a certain place and time.

It is crucial that this Court more firmly define the criteria for application of the "stop and frisk," "investigative stop," and vehicular exigency exceptions to the Constitutional probable cause and warrant requirements, lest those exceptions utterly pre-empt the general rules. It is significant that the Eighth Circuit Court did not even cite or attempt to distinguish **Coolidge v. New Hampshire**, 503 U.S. 443 (1971); **Whitely v. Warden**, 401 U.S. 560 (1971), or **Chimel v. California**, 395 U.S. 752 (1969), although they were heavily relied upon by Petitioner on appeal. This underscores the danger of the present situation: lower courts may pick and choose among this Court's decisions to support desired results; in doing so they will violate not only this Court's guidelines, but the Fourth Amendment itself.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted

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Dated: August 22, 1972

APPENDIX

United States Court of Appeals
for the Eighth Circuit

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No. 72-1091

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United States of America,
Appellee,

vs.

Thomas George Azzone,
Appellant.

} Appeal from the United States District Court for the District of Minnesota.

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Submitted: June 13, 1972.

Filed: August 1, 1972.

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Before Ross and STEPHENSON, Circuit Judges, and DAVIES,* Senior District Judge.

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DAVIES, Senior District Judge.

Thomas George Azzone was indicted for receiving and concealing with intent to convert to his own use, stolen United States postage, in violation of 18 U.S.C. § 641. He was tried to a jury and from judgment of conviction has perfected this timely appeal.

June 17, 1971, the Highland Park Post Office in St. Paul, Minnesota, was robbed of approximately $15,000.00 in

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* Sitting by special assignment.

U. S. postage. The exact figure is unimportant since the money worth of the stolen postage was clearly established to be far in excess of the value set out in the indictment.

Later on June 30, 1971, a United States Postal Inspector named Gosnell received a telephone call from a police officer in Bloomington, Minnesota, a city comprising part of metropolitan Minneapolis-St. Paul, advising Gosnell that he had received information from a confidential source, that is an informant who "had been very reliable in the past and had furnished information that had resulted in several felony arrests," that the appellant here, Thomas George Azzone, had approximately $15,000.00 worth of United States postage he would sell at half price.

The record reflects that later the same day Inspector Gosnell was notified by the Bloomington police that sale of the postage was to be effected by Azzone at 4:00 p.m., July 1, 1971, in a small park at the junction of Highways 36 and 61 near St. Paul, and that Azzone would be driving a black Cadillac with a specified license number, 4DV727.

Fifteen minutes before the appointed time four Postal Inspectors drove to the indicated road junction, saw the black Cadillac with the license plate 4DV727, approached a man standing near the car, identified themselves, inquired whether the man was Azzone, who admitted his identity, and requested Azzone's permission to search the car. The defendant replied, "There it is, help yourself." Finding nothing in the passenger area an inspector asked Azzone for the key to the car trunk. Azzone pointed to some keys in the ignition. While one inspector moved to the rear of the Cadillac to attempt opening the trunk, another saw Azzone drop a key down the window well on the driver's side front door. Azzone was then arrested by the Postal Inspectors. At this point Azzone attempted to tear up and swallow a paper, later found to be an inventory of the stolen postage. Two inspectors recovered

the key from the window well, opened the trunk and there found and seized stolen postage stock valued at $13,646.44. The Cadillac in which the stolen postage was found was registered in the name of the defendant Azzone.

The issues presented to us are:

(1) Was there probable cause to arrest Azzone, without a warrant, for possession of stolen Government property, in the circumstances here presented?

(2) Was the search of the trunk of Azzone's car, after his arrest, valid in this setting?

We answer each question in the affirmative.

From the plethora of cases cited to us, we distill a very few, which in our judgment, are dispositive of this appeal.

Less than one year ago this Circuit decided *White* v. *United States*, 448 F.2d 250 (8th Cir. 1971), a case turning upon validity of arrest, search of a defendant's rented car and the seizure of counterfeit money.

In *White*, on June 7, 1970, a Secret Service agent in Omaha, Nebraska, received a telephone call from an informant that a man using the alias of Bennett was in the city with counterfeit money. The informant further told the agent he thought Bennett's real name was White, and gave a detailed description of White and the rented Dodge Charger he was driving. This same informant had supplied reliable information in two or three prior cases, and in the *White* case the information was not based on personal knowledge but was hearsay from a third party. Late in the day on June 7th Omaha police discovered a car matching the description given them by the Secret Service parked on a street. The driver was slumped over the steering wheel. Police surrounded the car and ordered its

occupant out of it. The occupant was Bennett, who later confessed his real name was White. As White got out of the car, a policeman reached in the back seat and removed a small plastic bag containing a syringe. White was searched for weapons but had none. His driver's license, obviously altered, bore the name of Bennett. Bennett (White) was thereupon booked for driving with an altered driver's license. It was discovered that White was a known narcotics addict with a history of prior convictions, and based upon this information, together with the syringe found in his car, a warrant to search White's car for narcotics was obtained, and while no narcotics were found 39 counterfeit twenty dollar bills were discovered under the passenger's side of the front seat of the car. White's indictment, prosecution and conviction of possessing counterfeit money followed.

In the case at bar, as in *White*, there is a remarkable similarity between the tips given the authorities:

In each case there was (a) a description of the man; (b) his name; (c) the make of the car the man would be driving; (d) in *White* the name and year of the car, in appellant Azzone's case the name of the car (Cadillac) and its precise license number, 4DV727; (e) in Azzone's case the informant said he would have some $15,000.00 worth of United States postage with him and in *White* that the suspect would have twenty dollar counterfeit bills in his possession. We observe that in appellant Azzone's case, as in *White*, the observations were specific and proved to be accurate.

In affirming *White* this Court, speaking through Judge Gibson, said, on page 251:

> "The defendant seeks to distinguish *Terry* mainly on the grounds that in this case the officers had not personally observed any suspicious conduct on the part

of the defendant, as of the time of the initial stop. It is true that most of the cases involving an 'investigative stop' under the *Terry* case have involved personal observation of suspicious activity by the police officer. However, we do not believe that the justification for an investigative stop under the Fourth Amendment is necessarily predicated upon personal observation. It is rather predicated upon the 'specificity of information' upon which the police act. Terry v. Ohio, 392 U.S. at 21 n. 18, 88 S.Ct. 1868, 20 L.Ed.2d 889. This specificity of information can of course be obtained through personal observation. But it can also be obtained from other sources. And one of these traditional sources has always been the informer's tip. In determining whether at the time of this stop, which was admittedly based in part on the informer's tip, the police had enough specific information to justify the intrusion, we must be guided by the standards of Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *see also* United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971)."

In *White* the validity of the search warrant was attacked. In appellant Azzone's case there was no search warrant. Indeed, Azzone gave the officers permission to search his car when he said to them, "There it is, help yourself."

*White* addressed itself to a warrantless search, at page 254, in this manner:

"While the defendant has attacked the validity of the search warrant in this case, we do not find it necessary to pass on this question, because we believe that

the search can be justified as a warrantless search based upon probable cause under the principles of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). *Chambers* noted that not 'in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords.' *Id.* at 50, 90 S.Ct. at 1981."

Finally, we turn to *Adams v. Williams,* 40 U.S. Law Week 4724 (U.S. June 12, 1972), the most recent pronouncement of the United States Supreme Court in the area of search and seizure. We think this decision effectively places its imprimatur on our decision in *White v. United States,* 448 F.2d 250 (8th Cir. 1971), and that its rationale is controlling in the case now under consideration.

In *Adams* a police sergeant was patrolling alone in his car on a Connecticut city street in the small hours of the morning. Some person known to the sergeant approached his patrol car and informed the officer that a man seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The police officer approached the car and asked the occupant, Williams, to open the car door. Instead Williams rolled down his window, whereupon the sergeant reached down and removed a fully loaded gun from Williams' waistband. The gun was not visible from outside the car. Williams was arrested for unlawfully possessing a pistol and when other officers arrived Williams and his car were searched. Officers found heroin on his person and in his car. A machete and second revolver were discovered concealed in Williams' car.

Williams argued that the seizure of his revolver, upon which was predicated the search and seizure of the second gun, the machete and narcotics, was not justified by the

informant's tip to the Connecticut police sergeant, and that the officer's actions were unreasonable, absent a more reliable informant or some corroboration of the tip under the teachings of *Terry v. Ohio, supra.*

We think it unnecessary to lengthen our opinion by a complete recitation of the text and reasoning in *Adams v. Williams, supra,* but are content to quote its language at page 4724:

> "In *Terry* this Court recognized that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.' 392 U.S., at 22. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response."

The Supreme Court concluded in *Adams* by saying at page 4725:

> "Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. See *Draper* v. *United States,* 358 U.S. 307, 311-312 (1959). Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action:
>
> > 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which

reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949).

"See also *id.,* at 177. Under the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful. See *Brinegar* v. *United States, supra; Carroll* v. *United States,* 267 U.S. 132 (1925). The fruits of the search were therefore properly admitted at Williams' trial, and the Court of Appeals erred in reaching a contrary conclusion."

Since probable cause existed for Azzone's arrest, the resultant search and seizure incident thereto was fully justified.

The judgment of the District Court is affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-316

THOMAS GEORGE AZZONE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of having received and concealed stolen United States postage stamps in violation of 18 U.S.C. 641. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A 1-8).

On the basis of a detailed tip by a previously reliable informant, whose information had led to several felony arrests, postal inspectors approached petitioner

who arrived under circumstances predicted by the informant for the sale of the stolen stamps. The officers obtained petitioner's consent to search the car.[1] When they requested the key to the trunk, petitioner dropped it between the window and the door after attempting to divert their attention. He was thereupon arrested, and taken to police headquarters. The agents then recovered the key, opened the trunk, and found the stolen stamps (App. 15-19).[2]

On these facts the court of appeals properly held that the arrest and the search of the trunk were valid. There was clearly probable cause for his arrest and for the search under the principles of *Draper* v. *United States*, 358 U.S. 307. Not only was there substantial corroboration of the information supplied by the reliable informant but petitioner's attempt to conceal the trunk key after indicating he was otherwise agreeable to the search of the interior of the car supported the soundness of the belief that the contra-

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[1] The exchange was somewhat ambiguous as to the scope of the consent given. Petitioner argues that there was no consent to search the trunk, but only the interior. The district court made no finding on this issue. The court of appeals was nevertheless of the view that "Azzone gave the officers permission to search his car * * *" (Pet. App. A 5). But the question is not relevant because of the existence of probable cause here.

[2] "App." refers to the Appendix in the court of appeals, which contains the testimony offered at the pre-trial motion to suppress. At the conclusion of the testimony, petitioner's counsel admitted that there were "reasonable grounds" for the search (App. 19) and the court denied the motion. Petitioner, through different counsel, renewed the motion at trial and the district judge denied it following an adversary presentation at which the foregoing facts were summarized (App. 21-27).

band stamps were in the trunk. The fact that petitioner was removed from the scene before the search of the trunk took place did not invalidate the search. See *Chambers* v. *Maroney*, 399 U.S. 42.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

SEPTEMBER 1972.

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